Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor

HIGH COURT (PENANG) — ORIGINATING MOTION NO 25–48–93
VINCENT NG J
3 MARCH 1994

Civil Procedure *— Prerogative orders — Certiorari — Appeal against decision of Industrial Court — Whether High Court may review decision of Industrial Court — Powers of High Court — Courts of Judicature Act 1964 para 1 of the Schedule*

Labour Law *— Industrial Court — Reference under s 20(3) of the Industrial Relations Act 1967 — Whether Industrial Court precluded from interpreting collective agreement and general conditions of employment — Whether interpretation could only be made if there was an application under s 33 — Industrial Relations Act 1967 ss 20(3) & 33*

Labour Law *— Employment — Dismissal — Misconduct — No inquiry held before dismissal — Whether Industrial Court had duty to hold its own inquiry — Whether by not holding inquiry its decision was a nullity — Whether it had acted without jurisdiction — Industrial Relations Act 1967 s 30(5)*

Statutory Interpretation *— Construction of statutes — Ouster clauses — Whether jurisdiction of High Court ousted by s 33B(1) of the Industrial Relations Act 1967 — Principles applicable — Industrial Relations Act 1967 s 33B(1)*

The first respondent was an employee of the applicant. The applicant alleged that the first respondent had frequently absented himself from work and dismissed him after complying with the caution system incorporated into the collective agreement ('CA') to which the first respondent was a party. No domestic inquiry was held before the dismissal. The first respondent claimed unfair dismissal and the matter was referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act'). The Industrial Court found that although both the CA and general conditions ('GC') of employment did not provide for a domestic enquiry before dismissal of an employee, the CA and the GC did provide for two union officials to be present as observers at a domestic inquiry. As such, the court was of the opinion that where dismissal was contemplated, a domestic inquiry had to be held. Since a domestic inquiry was not held, there had been a breach of the rules of natural justice and the dismissal was an unfair labour practice.

The applicant contended that as the matter had been referred to the Industrial Court under s 20(3) of the Act, the court had acted in excess of its jurisdiction when it proceeded to interpret the CA and the GC as imposing a mandatory requirement for a domestic enquiry. The applicant contended that an interpretation of the CA and the GC could only be made if there was an application under s 33 of the Act, but since there was no such application, it was settled law that the High Court could intervene through the issue of certiorari.

During the court's consideration of the case, a second issue arose as to whether the Industrial Court had made a decision which was a nullity by not holding its own inquiry after finding that no inquiry had been held.

Held, granting the order of certiorari and remitting the case to the Industrial Court for determination on its substantial merits:

(1) The function of the High Court is not to sit as a court of appeal to review findings of the inferior tribunals and to consider the merits of the case. Its only function is to consider whether the inferior tribunal had performed its duties according to law.

(2) In a reference under s 20(3), the Industrial Court is not limited to consider only the issues referred to it as it has to act in accordance with the provisions in s 30(1), (5) and (6) which are expressly applicable to s 20(3) of the Act. It is unwarranted to say that a matter which comes under s 20(3) precludes the Industrial Court from interpreting the CA or the GC. The Industrial Court had acted well within the ambit of its jurisdiction in holding that the plaintiff was under a mandatory requirement to conduct a domestic enquiry before dismissing the first respondent.

(3) However, the provisions of s 30(5) which require the Industrial Court to act according to equity and good conscience, entail that if there is misconduct on the part of the workman, the court should enquire as to whether the dismissal of the employee was without just cause and excuse. In failing to hold its own enquiry, the Industrial Court had produced a decision which was a nullity. A decision is a nullity if it fails to observe its expressed obligations under s 30(1), (5) and (6) of the Act. On the ground of nullity of decision alone, an order of certiorari could be issued. Furthermore, by its failure to act within the provisions and jurisdiction conferred to it under s 20(3), the Industrial Court had acted outside and without jurisdiction.

(4) The Courts of Judicature Act 1964 at para 1 of the Schedule provides that when dealing with prerogative writs, the High Court has the power to issue any directions or orders for any purpose. The High Court when issuing an order of certiorari has the power to order a retrial of the matter in the Industrial Court on specified issues, in the nature of a mandamus and by way of proper directions. Thus the matter was ordered to be remitted and heard by another division of the Industrial Court on the substantial merits of the case.

(5) Upon the well-established principle that a creature of statute is cloathed with such powers only as are conferred on it by the statute which created it, privative clauses such as s 33B(1) of the Act cannot shelter the actions of the Industrial Court from judicial review. It is settled law that the court should give an expansive rather than narrow or strict interpretation to ouster clauses in statutes. A decision arrived at in excess of legal powers was no

A decision at all and could not be saved by any privative clauses. Therefore, the privative provision of s 33B(1) of the Act would not preclude the issue of certiorari in the circumstances.

[Bahasa Malaysia summary

B Responden pertama merupakan seorang pekerja pemohon. Pemohon telah mengatakan bahawa responden pertama sering tidak menghadirkan diri untuk bekerja dan telah memecat beliau selepas mematuhi sistem amaran yang terkandung di dalam perjanjian kolektif ('PK') kepada mana responden pertama menjadi suatu pihak. Siasatan domestik tidak dijalankan sebelum pemecatan itu. Responden pertama C mendakwa bahawa pemecatan itu tidak adil dan perkara itu telah dirujuk ke Mahkamah Perusahaan di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta itu'). Mahkamah Perusahaan berpendapat bahawa walaupun kedua-dua PK dan syarat-syarat am ('SA') pekerjaan itu tidak memperuntukkan supaya suatu siasatan domestik diadakan D sebelum pemecatan seseorang pekerja, PK dan SA itu memperuntukkan bahawa dua pegawai kesatuan perlu hadir sebagai pemerhati di sesuatu siasatan domestik. Dengan demikian, mahkamah berpendapat bahawa apabila suatu pemecatan akan dibuat, suatu siasatan domestik perlu diadakan. Oleh kerana suatu siasatan domestik tidak diadakan, terdapat suatu perlanggaran rukun keadilan asasi dan E pemecatan itu merupakan suatu amalan kerja yang tidak adil.

Pemohon berhujah bahawa oleh kerana perkara itu telah dirujuk kepada Mahkamah Perusahaan di bawah s 20(3) Akta itu, mahkamah telah bertindak melebihi bidang kuasanya apabila ia terus mentafsirkan PK dan SA itu sebagai mengenakan keperluan mandatori untuk suatu F siasatan domestik. Pemohon berhujah bahawa suatu pentafsiran PK dan SA itu hanya boleh dibuat jika terdapat suatu permohonan di bawah s 33 Akta itu, tetapi oleh kerana tidak terdapat permohonan sedemikian, adalah menjadi undang-undang mantap bahawa Mahkamah Tinggi boleh bercampur tangan melalui pengeluaran perintah certiorari. G

Semasa mahkamah mempertimbangkan kes itu, isu kedua timbul sama ada Mahkamah Perusahaan telah membuat suatu keputusan yang terbatal dengan tidak mengadakan siasatannya sendiri selepas mendapati bahawa suatu siasatan tidak diadakan.

H **Diputuskan**, memberi perintah certiorari dan meremit kes itu kepada Mahkamah Perusahaan untuk suatu keputusan mengenai merit substansial:

(1) Fungsi Mahkamah Tinggi bukanlah untuk bersidang sebagai suatu mahkamah rayuan untuk mengkaji semula pendapat tribunal bawahan dan mempertimbangkan merit kes itu. Fungsinya yang I tunggal adalah untuk mempertimbangkan sama ada tribunal bawahan itu telah menjalankan tugasnya mengikut undang-undang.

(2) Di dalam suatu rujukan di bawah s 20(3), Mahkamah Perusahaan tidak terhad untuk hanya mempertimbangkan isu yang dirujuk kepadanya kerana ia perlu bertindak mengikut peruntukan di dalam s 30(1), (5) dan (6) yang nyata terpakai kepada s 20(3) Akta itu. Adalah tidak wajar untuk berkata bahawa suatu perkara yang jatuh di bawah s 20(3) menghalang Mahkamah Perusahaan daripada mentafsirkan PK atau SA itu. Mahkamah Perusahaan telah bertindak dalam lingkungan bidang kuasanya apabila ia memutuskan bahawa plaintif dikehendaki secara mandatori untuk menjalankan suatu siasatan domestik sebelum memecat responden pertama.

(3) Bagaimanapun, peruntukan s 30(5) yang memerlukan Mahkamah Perusahaan bertindak mengikut ekuiti dan kemurnian, bermakna bahawa jika terdapat salah laku pada pihak pekerja, mahkamah seharusnya menanya sama ada pemecatan itu telah dilakukan tanpa sebab dan alasan yang adil. Dengan kegagalan Mahkamah Perusahaan untuk mengadakan siasatannya sendiri, ia telah memberikan suatu keputusan yang terbatal. Suatu keputusan adalah terbatal jika ia gagal mematuhi obligasinya yang nyata di bawah s 30(1), (5) dan (6) Akta itu. Atas dasar pembatalan keputusan itu sahaja, suatu perintah certiorari boleh dikeluarkan. Lebih-lebih lagi, dengan kegagalannya untuk bertindak mengikut peruntukan dan bidang kuasa yang diberikan kepadanya di bawah s 20(3), Mahkamah Perusahaan telah bertindak di luar dan tanpa bidang kuasa.

(4) Akta Mahkamah Kehakiman 1964 pada perenggan 1 Jadual memperuntukkan bahawa apabila bertindak terhadap writ prerogatif, Mahkamah Tinggi mempunyai kuasa mengeluarkan sebarang arahan atau perintah untuk sebarang tujuan. Mahkamah Tinggi apabila mengeluarkan suatu perintah certiorari, mempunyai kuasa untuk memerintahkan suatu perbicaraan semula perkara itu di Mahkamah Perusahaan atas isu tertentu, yang bersifat suatu perintah mandamus dan melalui pemberian arahan betul. Oleh itu, perkara itu diperintahkan supaya diremit dan didengar oleh bahagian lain Mahkamah Perusahaan atas merit substantial.

(5) Berdasarkan prinsip mantap bahawa sesuatu yang diwujudkan oleh statut hanya diselubungi dengan kuasa yang diberikan oleh statut yang mewujudkannya itu, fasal privatif seperti s 33B(1) Akta itu tidak dapat melindungi tindakan Mahkamah Perusahaan daripada kajian semula kehakiman. Adalah menjadi undang-undang mantap bahawa mahkamah seharusnya memberi pentafsiran luas berbanding dengan pentafsiran yang sempit atau ketat kepada fasal penyingkiran bidang kuasa di dalam statut. Suatu keputusan yang dibuat melebihi kuasa di sisi undang-undang langsung tidak merupakan suatu keputusan dan tidak dapat diselamatkan oleh fasal privatif. Oleh itu, peruntukan privatif s 33B(1) Akta itu tidak akan menghalang pengeluaran perintah certiorari di dalam keadaan ini.]

A **Notes**

For cases on prerogative orders, see 2 *Mallal's Digest* (4th Ed) paras 1835–1900; [1989] Mallal's Digest 295–298 and 448; [1991] Mallal's Digest 255; and [1991] Mallal's Digest 417–418.

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed) paras 629–665.

B For cases on jurisdiction of Industrial Courts, see 8 *Mallal's Digest* (4th Ed) paras 714–730; and [1991] Mallal's Digest 1285.

For cases on reference of industrial matters to High Court, see 8 *Mallal's Digest* (4th Ed) paras 736; and [1991] Mallal's Digest 1288.

C **Cases referred to**

1 *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor* [1984] 1 MLJ 363 (folld)

2 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (refd)

3 *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and* D *Restaurant Workers* [1988] 1 MLJ 306 (distd)

4 *Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 (distd)

5 *Workmen of the Motipur Sugar Factory Pte Ltd v The Motipur Sugar* E *Factory Pte Ltd* AIR 1965 SC 1803 (folld)

6 *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 (folld)

7 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163 (folld)

8 *Sabah Banking Employees' Union v Sabah Commercial Banks'* F *Association* [1989] 2 MLJ 284 (folld)

9 *Re Application by Yee Yut Ee* [1978] 2 MLJ 142 (folld)

10 *Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors* [1988] 1 MLJ 451 (refd)

11 *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* G [1952] 1 All ER 122 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 30, 33B

Anand Ponnudurai (*Shearn Delamore & Co*) for the applicant.

H *N Shanmugam* (*Shan & Gooi*) for the respondents.

Vincent Ng J: The first respondent was an employee of the applicant. It was alleged by the applicant that since 1988, the first respondent was frequently absenting from work without leave. The first respondent was I dismissed after the applicant had duly complied with the caution system incorporated into the collective agreement (exh MRH6 of encl 1) ('CA'), the common ground of both parties being that no domestic inquiry was held before such dismissal. The first respondent then claimed unfair dismissal

and the matter was referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act'). A

The applicant's main contention is that the Industrial Court had embarked on a mission to interpret the CA and general conditions ('GC') governing the employment of the first respondent by holding that the two conditions — at p 13 of the CA, under the caption 'Union Representation at Enquiries' and at p 21 of the GC under the caption 'Discipline', para 2, in s XXI — made it mandatory for the applicants to hold a domestic enquiry. B

There was no express conditions in the CA or the GC requiring the applicants to hold a domestic enquiry. However, the condition under 'Union Representation at Enquiries' states as follows: 'Not more than two Union officials shall be present at a disciplinary enquiry on any employee who is a union member and is covered by this agreement.' C

And the condition in the GC under 'Discipline' states: 'Not more than two Union officials shall be invited to sit as observers at a disciplinary enquiry affecting an employee.'

The part of the judgment of the chairman of the Industrial Court which learned counsel Mr Anand Ponnudurai sought to impugn was expressed thus: D

> It does appear that where dismissal is contemplated a disciplinary inquiry must be held. Both the GC and the CA provide for a disciplinary inquiry at which two Union officials shall sit as observers. E
>
> It is apparent therefore that the claimant was in fact entitled to or should have been accorded a hearing at an inquiry irrespective of whether it is called a due inquiry under the Employment Act 1955 or a disciplinary inquiry under the CA or the GC.

And the chairman went on further to add: F

> No workman however gross his misconduct should be condemned to a dismissal without being heard. In this case, there has been a breach of the rules of natural justice, a breach of the GC and a breach of the CA, both providing for Union representation at inquiries.
>
> In the circumstances, the dismissal of the claimant in breach of holding a disciplinary inquiry was an unfair labour practice. G

The contention of the applicant is that the Industrial Court had made an error in law affecting an excess of its jurisdiction in a matter referred to it under s 20(3) of the Act, when it proceeded to interpret the CA and the GC as imposing a mandatory requirement that before an employee is dismissed a domestic enquiry must be held, as both the GC and the CA do not provide for such domestic enquiry ante dismissal. H

According to Mr Anand, such an interpretation of the CA and the GC could only be made if there was an application under s 33 of the Act, but there was no such application and as such, the Industrial Court had no jurisdiction to make an interpretation of the CA or the GC; at the very most the said conditions in the CA and the GC should be taken to mean that if there was to be a domestic enquiry, then two union officials ought to be present. I

The function of the High Court is not to sit as a Court of Appeal to review findings of the inferior tribunals; its only function is to consider whether the inferior tribunal has performed its duties according to law, rather than to consider the merits of the case. See *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor*[1] at p 371. See also *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors*.[2] The inferior tribunal's function is only to perform duties as provided under s 20(3) (on representations for reinstatement of workmen), s 28 (president to regulate procedure and proceedings of his court), s 33 (on interpretation of any award or collective agreement taken cognizance of by the court) and s 56 of the Act (to adjudicate on any complaint as to non-compliance with an award or collective agreement).

Stated pithily, the point canvassed by applicant's counsel is that, the Industrial Court, by performing the function under s 33 in a reference under s 20(3) (whereas no question as to interpretation was referred to it under s 33), had exceeded its jurisdiction and in such a situation it is settled law that this court can intervene through the issue of certiorari. This court's attention was also drawn to the fact that no enquiry had been conducted by the Industrial Court in order to adjudicate on the justification for the first respondent's dismissal. In other words, after having made a finding that there was no domestic enquiry (that is, how the employee was dismissed), the Industrial Court did not proceed to decide on evidence adduced, whether the charges against the first respondent had been made out (that is, why he was dismissed).

The first issue for my decision is whether the Industrial Court had exceeded its jurisdiction when it interpreted the aforesaid conditions in the CA and the GC as mandatory for the applicants to hold a domestic enquiry. And the corollary to this question being, whether in a reference under s 20(3) it is within the ambit of an Industrial Court to interpret a CA or GC.

Learned counsel for the applicant cited the Supreme Court cases of *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers*[3] and *Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor*[4] in support of his contention that an Industrial Court is precluded from interpreting a CA or GC in a reference under s 20(3), and he asserted that the broad principle governing a case involving s 56 is also applicable to a case under s 20(3). I disagree with this contention as both the above cases concerned only s 56 of the Act, which specifically defines the limited ambit of the powers of the court. In my view, the wordings in ss 56 and 33 are so delimited so as to enable reliefs in industrial matters to be pigeonholed, so to say. In practical and simple terms, the effect of such delimitation of industrial reliefs in the two provisions is that, if the crucial issue between the parties is non-compliance with any award or any collective agreement then the complaint should be framed under s 56(1), and in the event the issue concerns interpretation of any award or collective agreement then the question referred should be framed under s 33; and the Industrial Court's parameter of jurisdiction would thus fall only within the ambit of the two respective sections.

However, with all due respect, it is unwarranted to say that a matter that comes under s 20(3) precludes the Industrial Court from interpreting the CA or the GC as this interpretation clearly flies in the teeth of the plain provisions of s 30 sub-ss (1), (5) and (6) (which subsection also clearly expresses that the provisions of s 30 apply to matters of reference under s 20(3)).

The relevant subsections of s 30 state as follows:

> (1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under section 20(3), to make an award (including an interim award) *relating to all or any of the issues.*
>
> ...
>
> (5) The Court shall act according to equity, good conscience and the substantial merits of the case *without regard to technicalities and legal form.*
>
> (6) In making its award, the Court shall *not be restricted to the specific relief claimed* by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) *but* may include in the award *any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).* (Emphasis added.)

In these three subsections, the Industrial Court is clearly vested with jurisdiction to make an award 'relating to all or any of the issues in dispute', to consider 'any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or reference to it under s 20(3)' and in so doing, it 'shall not be restricted to the specific relief claimed'. As such, I cannot understand how in the reference under s 20(3), an Industrial Court should be limited to consider only the issues referred to it but not the issues arising out of such issues referred, considering that it has to act in accordance with the provisions in sub-ss (1), (5) and (6) of s 30, which are expressly applicable to s 20(3) of the Act.

Apparently, it is for this reason that counsel for the applicant has failed to cite to this court any authority other than *Holiday Inn*[3] and *Dragon & Phoenix Bhd*[4] to support his contention that the Industrial Court had exceeded their jurisdiction in interpreting the CA and the GC.

Thus, I hold that the Industrial Court had acted well within the ambit of its jurisdiction in holding that the plaintiff was under a mandatory requirement in the CA and the GC to conduct a domestic enquiry before dismissing the first respondent.

As such, if this be the only issue, the privative provision of s 33(B)(1) of the Act would accordingly preclude the issue of certiorari by this court in the circumstances. However, this is not the end of the matter. This court would have to consider the second issue which had taken root during the course of my consideration of the first issue. The second issue being whether in the light of the cases *Workmen of the Motipur Sugar Factory Pte Ltd v The Motipur Sugar Factory Pte Ltd*,[5] *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor*,[6] *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors*[2] and *Anisminic Ltd v Foreign Compensation Commission*,[7] the Industrial Court by not acting

in a manner that it is required to act under the Act — had acted beyond its jurisdiction or had produced a decision which would be a nullity.

Upon the facts of this case it is obvious that the Industrial Court had only considered how the employee was dismissed. In my view, it is not only charged with the duty to find out whether natural justice has been observed by the employer (by the holding of a domestic inquiry before an employee can be dismissed on grounds of misconduct, as required the CA and the GC interpreted in the light of s 14 of the Employment Act 1955) but by virtue of s 20(3) of the Act, a duty is also placed on the Industrial Court itself to serve the cause of natural justice by proceeding to hold its own enquiry (through evidence led before it) to find whether the dismissal of the employee was without just cause and excuse; that is, in short, it has also to consider the substantial merits of the case, namely, why the employee was dismissed. See *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi*[6] which cited with approval the ratio in *Motipur Sugar Factory*,[5] particularly the following passage:

> Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to the Tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have really been made out.

This course of action the Industrial Court is obliged to take in a reference under s 20(3) as the absence of a domestic inquiry or the presence of a defective domestic inquiry is not a fatality, but merely an irregularity; though nevertheless, I must hasten to reiterate that the Industrial Court had acted within jurisdiction and was eminently correct in coming to the conclusion that holding a domestic enquiry is mandatory, considering the implicit aspect of the wording of the said conditions in the CA and the GC in conjunction with the mandatory requirement of an enquiry under s 14 of the Employment Act 1955. In such situation, it is open to the employer to justify his action before the Industrial Court. Surely, s 30(5) of the Act which requires the Industrial Court to 'act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form' entails that if there is some misconduct on the part of the workman, good conscience alone will require the court to enquire into and to adjudicate on the justification for the employee's dismissal; such enquiry does not have to be with the full trappings of a criminal court trial.

Section 33B(1) of the Act provides that:

> ... an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

In Malaysia, (see *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers*[1] and *Sabah Banking Employees' Union v Sabah Commercial Banks' Association*[8]), in Singapore (see *Re Application by Yee Yut Ee*[9]), and in England (see *Anisminic Ltd v Foreign Compensation Commission*[7]) — a House of Lord's decision; as well as the Privy Council decision in the Malaysian case of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors*[2]), the courts have been averse to give a literal interpretation to such a privative or finalty clause. Thus the courts have sought to neutralize the effects of these privative clauses on the rational that a decision arrived at in excess of legal powers (or if the Industrial Court had done or failed to do something in the course of the inquiry which it ought to or ought not to do) was no decision at all and could not be saved by any privative clause, however strongly worded it may be. Thus, it is settled that court should give an expansive rather than narrow or strict interpretation to such ouster clauses in statutes.

Because there is a need to ensure that Industrial Courts function according to the law that conferred its authority to decide, and upon the well-established principle that a creature of statute is cloathed with such powers only as are conferred on it by the statute which created it, it is consistently argued and held by the courts that such privative clauses cannot shelter the actions of the Industrial Court from judicial review.

In *Yee Yut Ee*,[9] the sentiment expressed by Choor Singh J was as follows:

> ... when the right to certiorari had been expressly taken away by statute the court rely upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court.

In the *Sabah Banking Employees' Union* case,[8] Abdul Hamid Omar LP, had this to say: 'The writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as the guarantors of due process and fair administration of law.'

And in the landmark case of *Anisminic Ltd*,[7] the House of Lords had this to say on the concept of 'jurisdictional errors' vis-a-vis privative clauses such as the current s 33B(1) of the Act (per Lord Pearce, at p 195):

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

And at p 171 Lord Reid said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not

A to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course B of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into C account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The general principle of jurisdictional errors was laid down in the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*[7] D and restated in *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor*[1] as follows [at p 364]:

> ... when words in a statute oust the power of the High Court to review decisions of any inferior tribunal by certiorari, they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that E its decision is a nullity.

The above cases have now settled as law, the proposition that where the Industrial Court had done something *or failed to do* something (as in this case) in the course of the inquiry which is of such a nature that its decision is a nullity, it has committed a jurisdictional error. And, in my view, a F decision is in the nature of a nullity if it fails to observe its expressed obligations under s 30(1), (5) and (6) of the Act.

In the event, there is more than sufficient data on the record for this court to herein hold and I so hold, that the Industrial Court had produced a purported decision which was a nullity, in having failed to proceed to hold G its own enquiry through evidence led before it as to whether the first respondent was dismissed without just cause and excuse — after having found that there was no such enquiry — when that court is clearly obliged (under s 30(1), (5) and (6) of the Act) to act according to equity, good conscience and *substantial merits* of the case on *any matter or thing* which it thinks necessary or expedient for the purpose of settling the trade dispute or H the reference to it under s 20(3). In this regard, I hold that matters referred under s 20(3) ought also to encompass matters arising out of the matters referred to during the trial. On this ground of nullity of decision alone this court could issue an order of certiorari.

But, further and in the alternative, I would also hold that by its failure to I act within the provisions and jurisdiction clearly conferred to it under s 20(3), read in conjunction with s 30(1), (5) and (6), the Industrial Court had in effect acted outside and without jurisdiction, indeed, off at a tangent, such that it ran foul of the dicta in *Dreamland*'s case[6] — a contradiction in terms,

apparently; a teaser in semantics, probably, but yet amply supported by case and legislative law. A

Upon both the grounds above, considered jointly or separately, I hold that the privative provision of s 33B(1) of the Act would not preclude the issue of certiorari in the circumstances, and I allow the application to remove the proceedings of the Industrial Court to this court, and an order of certiorari is hereby issued to quash the Award No 210 of 1993 of the Industrial Court. B

Now, the resultant question that this court is faced with, in a situation where the inferior tribunal had failed to consider certain matters which it ought to have considered is whether the High Court has the power, upon the issuing of an order of certiorari to quash the decision, to also consequentially make an order or direction remitting the matter for a rehearing (as in this case) on the substantial merits of the case. Defective decisions are often quashed by certiorari without any consequential order of mandamus, presumably upon the assumption that if its decision is annuled, the deciding authority will recognize that it must begin again. See *Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors*[10] at p 453. C D

In a case where a certiorari order is issued basically on the ground that the inferior tribunal had failed to consider certain matters which it ought to have considered, then the cardinal question to be posed is would the tribunal have come to a different decision if it had considered those matters. If one can say with utmost certainty that it would have given a different decision then the matter would have ended with just the order of certiorari. But in the interest of justice, if there is a probability, however marginal it may be, that the tribunal could, even after considering the matters it had earlier omitted to consider, come to the same or similar decision, then the matter ought to be remitted to the tribunal with an order or direction in the nature of a mandamus, to compel the tribunal to consider the matter or matters it ought to have considered; that is, as in our current case, the substantial merits of the case. Unfortunately, we do not have any Malaysian decision where this additional power of the High Court has been explored or explained. E F

The UK Rules of the Supreme Court 1965 under O 59 r 9(4) have a provision empowering the court to remit the matter to the tribunal. There is no such provision in our Rules of the High Court 1980. *Mallal's Supreme Court Practice* under para 53/1/11, however, cites *R v Northumberland Compensation Appeal Tribunal, ex p Shaw*[11] to say that there is a power to order a retrial. (In *Northumberland*,[11] see pp 127H–128A). In *Northumberland*,[11] Denning LJ (as he then was) gave a particularly apt and rational answer — to the argument that the Court of King's Bench may well be usurping to itself an appellate jurisdiction which has not been given to it, should it intervene to correct the decision of a statutory tribunal by ordering it to hear the case again — when he said in his speech as follows [at p 127]: G H

> The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the I

A inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its
B control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

It is also important to note that the Courts of Judicature Act 1964 at para 1 in the schedule provides that when dealing with prerogative writs the High Court has the power to issue any directions or orders for any purpose. It is,
C therefore, clear that the High Court when issuing an order of certiorari has the power to order a retrial of the matter in the Industrial Court on specified issues, in the nature of a mandamus and by way of proper directions.

Thus, consequentially, this court further orders that this matter be remitted back and be heard by another division of the Industrial Court on
D the substantial merits of the case.

As the first respondent cannot be held responsible for this impugned state of affairs, there shall be no order as to costs. It is hoped that this matter is taken up on appeal if only with the view to development of the law.

Order accordingly.

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Reported by Wong Kim Fatt

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